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In The

Supreme Court of the United States

October Term, 1998

ANNE ARUNDEL COUNTY, MARYLAND,

Petitioner,

v.

JOHN D. WEST, et al.,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

AMICI CURIAE BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IOWA, MARYLAND, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, PENNSYLVANIA, SOUTH DAKOTA, UTAH, WASHINGTON AND WYOMING, IN SUPPORT OF THE PETITION FOR CERTIORARI

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
THOMAS F. GEDE
Special Assistant Attorney General
*RICHARD M. FRANK
Senior Assistant Attorney General
**Counsel of Record*
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-8178
Fax: (916) 327-2319
Counsel for Amicus Curiae State of California

[Additional Counsel Listed On Inside Front Cover]

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OR CALL COLLECT (402) 342-2831

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BILL PRYOR
Attorney General of the
State of Alabama

GRANT WOODS
Attorney General of the
State of Arizona

WINSTON BRYANT
Attorney General of the
State of Arkansas

GALE A. NORTON
Attorney General of the
State of Colorado

M. JANE BRADY
Attorney General of the
State of Delaware

MARGERY S. BRONSTER
Attorney General of the
State of Hawaii

THOMAS J. MILLER
Attorney General of the
State of Iowa

J. JOSEPH CURRAN, JR.
Attorney General of the
State of Maryland

DON STENBERG
Attorney General of the
State of Nebraska

JOSEPH P. MAZUREK
Attorney General of the
State of Montana

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

PHILIP T. MCLAUGHLIN
Attorney General of the
State of New Hampshire

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Attorney General of the
State of New York

BETTY D. MONTGOMERY
Attorney General of the
State of Ohio

D. MICHAEL FISHER
Attorney General of the
State of Pennsylvania

MARK BARNETT
Attorney General of the
State of South Dakota

JAN GRAHAM
Attorney General of the
State of Utah

CHRISTINE O. GREGOIRE
Attorney General of the
State of Washington

WILLIAM U. HILL
Attorney General of the
State of Wyoming

QUESTIONS PRESENTED

1. Whether application of the Fair Labor Standards Act Amendments of 1974 to government firefighters who perform emergency medical services violates the Tenth Amendment and the Constitution's structural framework of dual sovereignty by: (i) directing the functioning of state and local public safety operations; and (ii) interfering with the provision of essential governmental emergency services.

2. Whether this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), should be overruled.

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AMICI CURIAE BRIEF

The States of California, Alabama, Arizona, Colorado, Delaware, Hawaii, Iowa, Maryland, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Dakota, Utah, Washington and Wyoming, respectfully file this brief *amici curiae*, pursuant to Supreme Court Rule 37.4. The brief is submitted in support of the petition for certiorari filed in this case by Anne Arundel County, Maryland.

INTEREST OF *AMICI CURIAE*

California and its sister States represent sovereign entities in our federal system. Each of the *amici* States has enacted its own set of regulatory programs, under its police power authority, to protect the health, safety and welfare of its citizens. Except to the very limited extent they are preempted by the federal government under the Supremacy Clause of the U.S. Constitution, these state regulatory efforts constitute distinct governmental programs, enacted and administered by the sovereign States.

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people.

This Court has repeatedly recognized that the Tenth Amendment is but one manifestation of the Constitution's overriding concern with fostering and protecting our system of dual sovereignty. Moreover, the text of the

Constitution provides the beginning rather than the end of every inquiry into questions of federalism, for "behind the words of the constitutional provisions are postulates which limit and control." *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934); see also, *Printz v. United States*, 521 U.S. ___, 117 S.Ct. 2365, 2376 (1997).

The present case presents a clear and present danger to these principles of cooperative federalism. By declaring the most essential of governmental functions to be subject to the congressional mandates of the Fair Labor Standards Act, 29 U.S.C. § 202 ff. (FLSA), the courts below have allowed the serious disruption of efforts by state and local governments to serve the public health, safety and welfare. The decision below, finding that county firefighters who perform emergency medical services are subject to the full federal mandates of the FLSA, has several unfortunate impacts. It strains local government fiscal resources at a time when finite revenues are needed to address an ever-increasing array of public needs. It disrupts the day-to-day operation of core government services upon which the public is vitally dependent. And finally, it serves as a formidable disincentive to state and local government innovation, experimentation and reform.

This litigation is not an aberration. To the contrary, state and local governments throughout the United States have faced similar attacks on their sovereignty in the 13 years since *Garcia* was decided. The Court need look no further than the FLSA itself to gage the untoward impacts on state and local governments.

A few examples are illustrative. In California, the FLSA's mandated application to state salary and personnel programs has had a distorting effect on the organization and staffing of state government. Due to the overtime provisions of the FLSA, California finds itself in the anomalous situation of having to pay some rank-and-file employees more than the supervisors who oversee them. The deleterious effect on efforts to recruit and retain effective managers in government service is obvious.

FLSA's application to the States can have enormously disruptive effects on the state budgetary process and the public fisc as well. In California, the inability of state political leaders several years ago to enact a state budget on a timely basis resulted in a short delay in payment of salaries to state employees. That delay, in turn, resulted in federal courts' finding that the State of California had violated the FLSA. See, *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), *cert. denied*, 510 U.S. 1081 (1994); see also, *Caldman v. State of California*, 852 F.Supp. 898 (E.D. Cal. 1994) (imposing liquidated damages against the State under the FLSA). In an effort to comply with this judicially-declared FLSA mandate, state officials have in more recent years paid salaries to state employees before a state budget was enacted, despite the fact that the California Constitution specifically proscribes any such payments in the absence of a validly-enacted state budget. Cal. Const., Art. IV, § 12(c). Earlier this year, California taxpayers invoked that state constitutional provision to sue California officials in state court, seeking to bar the immediate payment of state employee salaries as mandated under the FLSA. *Howard Jarvis Taxpayers Assn. v.*

Connell, Los Angeles County Superior Court No. BC193174.

Nor are the deleterious impacts of the FLSA limited to California. In Iowa, for example, 117 supervisory law enforcement officers employed by that State's Department of Public Safety, up to and including the chief executive officer with the Iowa State Patrol, have sued to recover overtime wages pursuant to the FLSA. They predicated their claim on the theory that they are not paid on a "salary basis" due to implementation of the Department's disciplinary policy, despite the fact they perform management functions. Accordingly, they argue that the FLSA "section 7(k)" exemption is inapplicable to them under implementing federal regulations. This litigation has, in turn, required Iowa officials to modify substantially the disciplinary procedures for law enforcement officers to avoid substantial overtime liability. See *Raper v. State of Iowa*, Polk County District Court No. CL 6891841.

The present case provides the Court with the opportunity to revisit the FLSA's applicability to state and local governments under applicable principles of federalism. In the view of the *amici* States, the application of the FLSA to the public safety employees at issue herein represents "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *City of Boerne v. Flores*, 521 U.S. ___, 117 S.Ct. 2157, 2171 (1997).

A decision that Congress has the broad authority under the Commerce Clause to disrupt core state health and safety programs under the FLSA and similar federal

legislation has the potential of vast and far-reaching consequences for all States. *Amici* States are therefore vitally interested in the resolution of this case.

REASONS FOR GRANTING THE WRIT

Petitioner Anne Arundel County has identified several compelling reasons warranting the Court's review in this case. A threshold issue is how the section 7(k) exemption contained in the FLSA should be interpreted. As petitioner County notes, this question has divided the lower courts and produced conflicting and inconsistent results. Petition at 14-17. That fact alone warrants exercise of the Court's discretionary review. Supreme Court Rule 10(a).

Of even greater concern to *amici* States, however, is the fact that the decision below contravenes basic principles of federalism upon which this nation is founded. Those principles have been recognized and articulated in a series of recent decisions by this Court. The Fourth Circuit's opinion, by fundamentally misconstruing the Constitution and the Court's federalism precedents, threatens tenets of state sovereignty that this Court has repeatedly deemed crucial and inviolate in our federal system. The resulting conflict between the decision below and applicable constitutional principles governing the state-federal relationship provide an additional, and even more compelling, reason why the petition should be granted. Supreme Court Rule 10(c).

Amici States offer two arguments in support of the constitutional arguments advanced in the County's petition. First, the decision below is fundamentally inconsistent with the Constitution, as underscored by this Court's recent federalism decisions. In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), a majority of the Court held that the FLSA generally applies to state and local governments. However, *Garcia* acknowledged that "the States unquestionably do 'retai[n] a significant measure of sovereign authority.' " *Garcia*, 469 U.S. at 549, quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting). *Garcia*, moreover, dealt with the status of municipal transit workers under the FLSA. By contrast, at issue in this case is the operation of emergency medical services – a function that is at the very heart of government's responsibility to protect public health and safety. Whatever the proper boundaries of *Garcia*, that decision should not be construed to require the FLSA be made applicable to county firefighters who provide emergency medical services to the public.

Second, *amici* States respectfully urge that *Garcia v. San Antonio Metro. Transit Auth.* be overruled. To the extent that *Garcia* can be interpreted to hold that the Constitution imposes no federalism-based limits on the application of the FLSA to the States, that decision is inconsistent with both the Constitution and a series of more recent federalism cases decided by the Court. Those latter decisions repeatedly confirm that the U.S. Constitution envisions a system of dual sovereigns, and that Congress may not under its Commerce Clause authority enact legislation that binds the States in disregard of the States' sovereign powers. *Amici* States submit that the time has

come to conform *Garcia* to this Court's federalism jurisprudence developed over the past decade.

A. The FLSA Amendments of 1974 are Unconstitutional as Applied to the Firefighters Performing Emergency Medical Services in this Case. *Garcia* Does Not Compel – and Should Not Be Extended to Justify – a Contrary Conclusion.

In 1974 amendments to the FLSA, Congress made the overtime and minimum wage requirements of the FLSA generally applicable to employees of state and local governments. Pub. L. No. 93-259, codified at 29 U.S.C. section 203(e)(2)(C). To apply the FLSA to the employees at issue here – firefighters specially trained and assigned to provided emergency medical services to the public – contravenes the Tenth Amendment and related principles of federalism.[1]

This case involves government officials – and government programs – addressing the most fundamental of government's responsibilities to protect public health and safety. As petitioner County has noted, the majority of

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[1] Constitutional principles of federalism and State sovereignty are properly invoked by either the States or their political subdivisions. *Printz v. United States*, 521 U.S. ___, 117 S.Ct. 2365, 2382, n.15 (1997); *National League of Cities v. Usery*, 426 U.S. 833, 855-856 (1976), *overruled on other grounds* in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The exception to this rule is the States' Eleventh Amendment immunity from unconsented suit in federal court; that immunity may only be asserted by the States themselves, and not by the States' political subdivisions. *Monell v. New York City*, 436 U.S. 658, 690, n.54 (1978).

fire department responses in Anne Arundel County relate to the provision of emergency medical services. Petition at 11-12. The County's experience reflects that of local fire departments throughout the United States. *Ibid.*

To force petitioner County to apply the FLSA to these public safety employees would be particularly disruptive of county programs and invasive of the public fisc. It would permit Congress to "exercise power in a fashion that impairs the States' integrity [and] their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975).

Garcia v. San Antonio Metro. Transit Auth., supra, does not compel such a result. *Garcia* held that the FLSA could be applied to municipal transit workers, consistent with the Tenth Amendment. However, the Court's decision in *Garcia* stressed that this holding did "not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." 469 U.S. 528, 556. Moreover, the majority in *Garcia* was careful to note "the special concerns of States and localities with respect to" firefighting and law enforcement personnel. *Id.* at 554, n.17. In his dissent in *Garcia*, Justice Powell took pains to characterize fire prevention, police protection and public health as "epitomiz[ing] the concerns of local, democratic self-government." *Id.* at 575 (Powell, J., dissenting).

The application of the FLSA in this case would have enormously disruptive consequences on the most essential public services performed by States and local governments. The decision of the lower court, if affirmed,

abrogates the States' sovereign ability to protect the health and safety of their citizens. Similarly, it disallows the governmental framework by which States and their political subdivisions fund and provide those services.

Even without abandoning *Garcia*, the Court can insure that States' legitimate sovereign interests are preserved by applying the constitutional principles announced in *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Printz v. United States*, 521 U.S. ___, 117 S.Ct. 2365 (1997); *City of Boerne v. Flores*, 521 U.S. ___, 117 S.Ct. 2157 (1997); *Arizonans for Official English v. Arizona*, 520 U.S. ___, 117 S.Ct. 1055 (1997); and related cases. The Court should do so by declining to follow the example of the lower courts in expanding *Garcia* beyond its factual or constitutional moorings. It contravenes important public policy considerations to make the FLSA applicable to county workers who provide emergency medical care to members of the public. More to the point, expanding *Garcia* to reach that result contravenes vital constitutional principles that this Court has reaffirmed over the last decade. Limiting *Garcia's* scope, and finding the FLSA inapplicable to the public officials at issue here, in turn places *Garcia* in a more proper constitutional context, and ensures that the application of the FLSA to the States is consistent with the constitutional principles this Court has enunciated in its federalism decisions subsequent to *Garcia*.

B. *Garcia v. San Antonio Metropolitan Transit Authority* Should Be Overruled.

1. *Garcia* Is Fundamentally Inconsistent With Federalism Principles Inherent in the Constitution, as Recognized in the More Recent Jurisprudence of This Court.

In its recent jurisprudence the Court has reaffirmed that, along with individual liberties and the separation of powers doctrine, federalism represents a key, inviolate theme of American constitutional law. In a series of recent decisions beginning with *Gregory v. Ashcroft*, this Court has reaffirmed that federalism is not an outdated or flaccid constitutional theory. It is, rather, one of the touchstones of the American system of government. See, e.g., *New York v. United States, supra; United States v. Lopez, supra; Seminole Tribe v. Florida, supra; City of Boerne v. Flores, supra.* "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz, supra,* 117 S.Ct. at 2381.

The Court's 1985 decision in *Garcia, supra,* is fundamentally inconsistent with the Constitution, as interpreted in the Court's more recent federalism precedents. The present case acutely demonstrate's *Garcia's* inconsistency with the most basic principles of State autonomy. The lower court itself noted "the strong commitment to state sovereignty evidenced in this series of [post-*Garcia* federalism] cases" (137 F.3d 752, 758), but ultimately concluded it was bound by *Garcia* to rule in favor of respondents. *Id.* at 760 ("Any decision to revisit *Garcia* is not ours to make.")

In the wake of *New York, Lopez, Printz,* et al., it is apparent that given the "constitutional postulates" of federalism, application of the FLSA to the States "compromise[s] the structural framework of dual sovereignty." *Printz, supra,* 117 S.Ct. at 2383. Accordingly, *amici* States respectfully urge the Court to take this opportunity to overrule *Garcia* as inconsistent with its more recent jurisprudence and the most basic principles of federalism.

2. The Continuing Impacts of *Garcia* on State Sovereignty Are Both Deleterious and Severe, as the Present Case Demonstrates.

How California, its sister States, and local entities throughout the nation organize and prioritize the delivery of governmental services represent the most fundamental judgments by which States and their political subdivisions define themselves. It is these activities that "go to the heart of representative government." *Gregory v. Ashcroft, supra,* 501 U.S. 452, 461, citing *Sugarman v. Dougall,* 413 U.S. 634, 647 (1973). The provision of governmental services to protect public health, safety and welfare – and the ability to collect and appropriate the requisite funds to do so – is one of the principal, legitimate interests of States envisioned under federalism principles. *Duncan v. McCall,* 139 U.S. 449 (1891).

The fundamental error of the lower court in this case is in ignoring the teachings of this Court's ample federalism jurisprudence over the past decade. The court of appeals instead construed *Garcia* to hold that the FLSA applies "carte blanche" to the States – regardless of the

governmental programs or employees involved. Unhappily, that construction of the FLSA vis-a-vis the States has been routinely enforced by lower federal courts nationwide. See, e.g., *Biggs v. Wilson, supra,* 1 F.3d 1537.

In practice, *Garcia* has opened the door to an almost unlimited application of federal regulation of the States under the Commerce Clause – no matter what the ultimate effect on a State's sovereignty – to the exclusion of the federalism principles reaffirmed in such cases as *Gregory, New York, Printz, City of Boerne* and *Seminole Tribe.* The effect, in situations where the FLSA and similar statutes are applied to the States acting in their sovereign capacities, is to upset the careful constitutional balance of federal and state powers.

Another unhappy and unintended consequence of *Garcia* is to deprive the States, in many contexts, of acting as the "laboratories of social and economic experiment" that Justice Brandeis urged them to be nearly 70 years ago. *Garcia,* 469 U.S. at 546, quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If States are to be treated as the functional equivalent of private businesses for purposes of the FLSA, the States' ability to deliver essential government services in an innovative and cost-effective manner will continue to be compromised.

Additionally, *Garcia* admonished that States should look principally to the federal political process for protection of their interests under the Constitution. *Id.* at 552-554. With all due respect, substantial federal legislation enacted since that time under the Commerce Clause demonstrates that the political process provides precious

little protection to state sovereignty. See, e.g., *New York* (Low-Level Radioactive Wastes Policy Amendments Act); *City of Boerne* (Religious Freedom Restoration Act); and *Printz* (Brady Handgun Control Act). More to the point, the Court's recent federalism jurisprudence reaffirms the principle that the guarantees of State sovereignty woven into the fabric of the Constitution can and should be enforced by a watchful judiciary. *Ibid.*; see also, *Lopez, supra*. *Garcia's* dismissal of judicial remedies in favor of the political process abandons federalism principles. It is at variance with the Constitution, as reflected in the Court's overall jurisprudence on the subject.[2] *Amici* submit that the Court should expressly recognize that fact and abandon *Garcia*.

3. *Garcia* Should Be Replaced With a Constitutional Standard That Immunizes Core State Programs From Generally-Applicable Federal Legislation Enacted Under the Commerce Clause. This Court and Constitutional Scholars Have Articulated Several Alternate Tests That Would Serve That Purpose.

In overruling its earlier decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), a bare majority of the Court in *Garcia* concluded that the "traditional governmental functions" test it characterized as being articulated

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[2] "The States' role in our system of government is a matter of constitutional law, not of legislative grace." *Garcia, supra*, 469 U.S. at 567 (Powell, J., dissenting).

in *Usery* had subsequently proven both amorphous and unworkable. 469 U.S. at 538.[3]

Four dissenting justices took issue with that conclusion. Justice Powell characterized *Usery* as establishing a workable, multifactored balancing test, consonant with many constitutional standards utilized by the Court in other contexts. 469 U.S. at 562-563.[4] Justice O'Connor, also in dissent, suggested a modified balancing test which weighs the need for State autonomy against federal interests. *Id.* at 588-589 (O'Connor, J., dissenting). Then-Associate Justice Rehnquist noted these various formulations, suggested that each appeared plausible, and presciently noted:

> I do not think it incumbent on those of us in dissent to spell out the fine points of a principle

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[3] The Court in *Usery* had actually utilized *several* discrete concepts in identifying those State programs which it found the Tenth Amendment and related constitutional principles to insulate from federal control under the Commerce Clause. See, e.g., 426 U.S. at 850 (describing "essential governmental services"); *id.* at 851 (identifying federal statutes that "impermissibly interfere with the integral governmental functions" of States); *id.* at 852 ("displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions"). The Court's decision in *Usery* is also noteworthy in that it repeatedly refers to firefighters and public health officials as embodying this very type of excluded state program.

[4] The *Garcia* majority itself began its analysis by characterizing *Usery* as involving a four-part constitutional test. *Id.* at 537. That *Usery* has subsequently come to be associated with the "traditional governmental functions" standard thus seems both ironic and overly-simplistic.

> that will, I am confident, in time again command the support of a majority of the Court.

Id. at 580 (Rehnquist, J., dissenting).

The key point is that the *Usery* standard was neither as simplistic as its legacy suggests, nor as unworkable as *Garcia* or respondents herein would indicate.

This Court, however, need not resurrect the precise legal standard(s) identified in *Usery* in order to move beyond *Garcia* and bring its FLSA jurisprudence into conformance with the proper dictates of federalism. Indeed, the Court's more recent federalism precedents articulate related constitutional standards that could prove quite helpful in determining which congressional statutes can be applied to States, consistent with the demands of our federal system. *Gregory v. Ashcroft*, for example, focused on "areas of traditional state authority." 501 U.S. 452, 469; accord: *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 288 (1981). In *Printz*, the Court recently suggested an appropriate benchmark would be "whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments." 117 S.Ct. 2365, 2383.

As might be expected, constitutional scholars have not been reticent about suggesting their own constitutional standards for determining when Congress' Commerce Clause authority may be made binding upon the States under the Tenth Amendment and related federalism principles. See, e.g., Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84, 105 (1985) (proposing a "core governmental functions" test that

would restrict State immunity to "essentially internal state activities"); Douglas A. Axel, *The Constitutionality of the Freedom of Choice Act of 1993*, 45 Hastings L. J. 641, 655 (1994) (proposed test would focus in part on those government functions "unsuitable to leave to the private sector"); Igor Kirman, *Standing Apart to Be a Part: The Precedental Value of Supreme Court Concurring Opinions*, 95 Columbia L. Rev. 2083, 2092 (1995); Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 Duke L. J. 1, 11-12 (1986) ("The correct response would have been for the Court to deal with these issues case by case, balancing the interests in state sovereignty against the interests in uniform national policy under the commerce clause"); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harvard L. Rev. 2180, 2207-2208 (1998). (federalism "may require some inquiry . . . regarding the degree to which application of a [federal] statute interferes with core, or important, state governmental functions.").

As the court of appeals below itself noted, even aside from *Usery*, this Court has previously utilized ad hoc tests in order to strike an appropriate balance between the needs of a national government and the rights of the sovereign States. 137 F.3d 752, 758-759, citing *Fry v. United States*, 421 U.S. 542 (1975); *South Carolina v. Baker*, 485 U.S. 505 (1988).

In sum, should the Court perceive it appropriate to do so, it can articulate a constitutional standard in this area distinct from that announced two decades ago in *Usery*. What *amici* States respectfully request is that the Court not abandon the field of state sovereignty entirely when it comes to federal legislation exemplified by the

FLSA, as occurred in *Garcia*. *Cf. Garcia*, 469 U.S. 528, 580 (O'Connor, J., dissenting) ("The Court today surveys the battle scene of federalism and sounds a retreat"). The instant case provides this Court with a timely and propitious opportunity to re-examine the vital constitutional principles which are presented by the County's petition for certiorari.[5]

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[5] The fact that these issues and their resolution are complex does not make them less appropriate for this Court's review:

> "It has been difficult for this Court to craft bright lines defining the scope of the state autonomy protected by *National League of Cities*. Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance." *Garcia, supra*, 469 U.S. at 588-589 (O'Connor, J., dissenting).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: November 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
THOMAS F. GEDE
Special Assistant Attorney General
*RICHARD M. FRANK
Senior Assistant Attorney General
*Counsel of Record

Counsel for Amicus Curiae
State of California

[Additional Counsel Listed On Inside Front Cover]